Supreme Court, U.S.
FILED

091529 MAY 10 2010

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SANJUANITA SEPULVEDA, *et al.*,
Petitioners,

v.

ALLEN FAMILY FOODS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DATED: JUNE 8, 2010

QUESTIONS PRESENTED

Petitioners present two questions for review:

1. When calculating compensable time under the Fair Labor Standards Act ("FLSA"), does section 203(o)'s exclusion of "time spent in changing clothes" apply to time spent donning and doffing protective equipment that is put on over unchanged clothes – a question on which multiple circuits have split?

    A. Does the plain language of the FLSA's exclusion for "time spent in changing clothes" apply to time spent putting protective equipment on top of clothes – a question on which multiple circuits have split?

    B. Does the doctrine of statutory interpretation that remedial statutes should be construed liberally in favor of those they are intended to protect apply to the "changing clothes" exclusion – a question on which multiple circuits have split?

2. Does the "continuous day rule" require that employees be compensated for time spent donning, doffing, and sanitizing equipment after the workday has indisputably begun and before it has ended?

LIST OF PARTIES

The parties below are listed in the caption. This case was filed as a class action pursuant to section 216(b) of the FLSA. Pursuant to the statute, approximately 250 current and former Allen employees opted into the plaintiff class. The employees in this class are the petitioners. A complete list of class plaintiffs can be found in the caption to the Fourth Circuit's opinion in this case, attached hereto as Appendix B.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners state that all members of the plaintiff class are individuals.

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The United States District Court for the District of Maryland granted Allen's motion for summary judgment in an order issued on September 16, 2008. The workers timely appealed the decision to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's order granting Allen's motion for summary judgment. 591 F.3d 209 (4th Cir. 2009).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the decision of the district court granting defendant's motion for summary judgment, was handed down on December 29, 2009. Because a timely petition for rehearing was denied on February 9, 2010, the initial deadline for filing this petition was May 10, 2010. The Court has now extended that deadline to July 9, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 29 United States Code, Section 203(o), the interpretation of which is at issue in this case, provides:

Hours worked.

In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the particular employee.

STATEMENT OF THE CASE

In January 2007, several chicken-processing workers filed this suit against Allen Family Foods, Inc. ("Allen") under the Fair Labor Standards Act ("FLSA") in the United States District Court for the District of Maryland. All of the workers work or have worked at Allen's Harbeson, Delaware plant on the production line that conveys chickens through the plant for killing, cleaning, processing, and packaging. As part of their work, Allen requires the workers to don an array of Personal Protective Equipment ("PPE") before they take their place on the production line each workday. At the start of each workday, the workers go to their lockers and are required to don over their regular clothing the following items of PPE: USDA-required rubber gloves; plastic sleeves; safety arm shields; steel-toe shoes; USDA-required smock; USDA-required plastic apron; safety glasses; ear plugs; bump cap; and USDA-required hair net. These items protect Allen's chicken products from contamination, and some of the PPE items also protect the workers from workplace injuries.

After donning this gear, the workers walk from their lockers to their respective stations at the plant. Prior to taking their place on the line, the workers must sanitize the gear. Later, at the beginning of their unpaid 30-minute lunch break, the workers walk from the production line to the lunch room and must doff much of the PPE to avoid contaminating it at lunch and to avoid unsanitary conditions in the lunch room. After lunch, the

workers are required to re-don the PPE, walk back to the production area, re-sanitize the PPE, and be in place on the production line by the end of the unpaid lunch break. Failure to don the PPE and follow the procedures described above can subject an Allen worker to discipline and possible termination.

The workers challenged Allen's denial of compensation for time they spent donning and doffing Personal Protective Equipment ("PPE"), sanitizing the PPE, and walking between their lockers and their line positions at the beginning and end of each workday. They also challenged Allen's denial of compensation for time spent performing these activities at the beginning and end of the lunch break. The district court provisionally certified the claim as a collective action, and plaintiffs notified all potential class members that they could "opt in" to the action pursuant to 29 U.S.C. § 216(b). Approximately 250 workers opted into the action.

After liability-related discovery, the parties filed cross-motions for full or partial summary judgment. The main controversy in these motions centered on interpretation of section 203(o) of the FLSA, which permits an employer to deny compensation for time spent "changing clothes or washing at the beginning or end of each workday" if the employer and union agree to exclude such time "by the express terms of or by custom or practice under a bona fide collective bargaining agreement."

Because the workers in the Harbeson plant are employed pursuant to a collective bargaining agreement, Allen argued that donning and doffing the PPE constituted "changing clothes" within the meaning of section 203(o), and that time spent donning and doffing was thus permissibly excluded from compensation by custom or practice under the collective bargaining agreement. The workers asserted that donning and doffing of such specialized protective gear over one's ordinary clothes could not be held to constitute "changing clothes" for purposes of the statute. Decisions of this Court and the Fourth Circuit establish that the remedial purpose of the FLSA requires courts to construe exemptions from FLSA coverage narrowly and to find in favor of coverage to the greatest extent possible consistent with Congressional intent. The workers argued that, given the plain meaning and common understanding of the phrase "changing clothes," Allen had not met its burden to show that Congress had clearly intended the exemption in section 203(o) to encompass donning and doffing of specialized protective gear over an employee's regular clothes, which remain unchanged. Thus, established principles of statutory interpretation precluded a holding that 203(o) applies to the donning and doffing of the workers' PPE.

In the alternative, the workers argued that even if 203(o) were held to bar their claim for compensation for time spent donning and doffing PPE at the beginning and end of each workday, nothing in the statute permitted Allen to deny

compensation for time spent walking to and from the production line, sanitizing the PPE, and donning and doffing the PPE at times other than the beginning and end of the day. Application of this Court's clearly established "continuous day rule" also entitles the workers to compensation for time spent in these activities during the workday. Thus, at a minimum, the court should have permitted the workers to proceed with their claims with respect to time spent walking, sanitizing the PPE, and donning and doffing PPE at the beginning and end of the lunch break.

The district court ruled in Allen's favor, holding that section 203(o) barred the workers' claims. It entered final judgment granting Allen's motion for summary judgment. On appeal, the Fourth Circuit held that donning and doffing the PPE constituted "changing clothes" within the meaning of section 203(o) and affirmed the district court decision. The Fourth Circuit's opinion did not apply the accepted doctrine that the FLSA is a remedial statute to be construed liberally in favor of coverage. It also failed to discuss its decision not to apply the continuous day rule to the workers' claims regarding donning, doffing, sanitizing, and walking at times other than the beginning and end of each workday.

This Petition seeks to have the Court review the holding below that donning and doffing the PPE constitutes "changing clothes" within section 203(o), and that this section applies to bar the workers' claims. The workers also seek to have the

Court review the Fourth Circuit's failure to apply the established remedial standard of statutory interpretation to the reading of section 203(o). There is a conflict among the circuits regarding these two legal issues. This Petition also seeks to have the Court review the Fourth Circuit's failure to apply the "continuous day rule" to entitle the workers to compensation for time spent donning, doffing, and sanitizing the PPE and walking at times other than the beginning or end of each workday.

REASONS FOR GRANTING THE PETITION

The issues presented for review in this case involve important questions of federal statutory interpretation with regard to section 203(o) of the FLSA. This petition is of exceptional financial importance to the thousands of low-income poultry workers in the United States. In addition to these workers, the principles at issue in this petition affect thousands more, almost all of whom are among the low-income workers whom the FLSA was enacted to protect. There is a distinct split among the circuits on the important issue of whether donning and doffing protective gear constitutes "changing clothes" within the meaning of section 203(o). This split creates great uncertainty for employers and employees attempting to discern their rights and obligations under the FLSA and for the courts charged with adjudicating these cases. Review by this Court is necessary to resolve the circuit split on this important issue.

In addition, there is a split among the circuits on the issue of which principles of statutory interpretation govern definitional exemptions from FLSA coverage. As described below, decisions of this Court have indicated that, in light of the statute's remedial purpose, definitional exemptions are to be interpreted in the same manner as express exceptions from coverage — that is, both types of exemptions are to be narrowly construed against the employer seeking to assert them. The Ninth Circuit has adopted this approach in a section 203(o) case. *See Alvarez v. IBP, Inc.* 339 F.3d 894, 905 (9th Cir. 2003), *aff'd in part and rev'd in part on other grounds*, 546 U.S. 21 (2005). In contrast, the Eleventh and Fourth Circuits have adopted the view that this remedial standard of interpretation does not apply to definitional exemptions from FLSA coverage. Thus, on this issue, the Fourth Circuit opinion below and the Eleventh Circuit directly conflict with the Ninth Circuit and this Court's established precedent. Review by this Court is necessary to clarify and resolve a split among the circuits regarding the appropriate standard of statutory interpretation applicable to definitional exemptions from coverage under the FLSA.

Finally, the Fourth Circuit failed to address the workers' alternative argument that, even if section 203(o) were held to bar their claims for time spent donning and doffing PPE at the beginning and end of each workday, the "continuous day rule" established by this Court would nonetheless entitle them to compensation for time spent walking and

for time spent donning, doffing, and sanitizing the PPE at times other than the beginning or end of each workday. Review by this Court is necessary to clarify that the continuous day rule applies to require compensation for activities performed during the internal part of the workday, regardless of whether 203(o) exempts some of these activities from coverage when performed at the beginning and end of the day.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER SECTION 203(o)'S EXCLUSION FOR TIME SPENT "CHANGING CLOTHES" APPLIES TO DONNING AND DOFFING OF PROTECTIVE EQUIPMENT.

A. In Conflict With Other Circuits, the Court Below Misinterpreted the Plain Language of Section 203(o) by Holding That Time Spent Donning and Doffing Protective Equipment on Top of Clothes Was "Time Spent in Changing Clothes."

There is a conflict among the circuits on the issue of whether donning and doffing Personal Protective Equipment ("PPE") constitutes "changing clothes" within the meaning of section 203(o). At least seven federal courts have held that donning and doffing protective gear does not fall within the scope of section 203(o)'s "changing clothes" exclusion. The Ninth Circuit has held that

section 203(o) does not apply to time spent donning and doffing PPE in the beef-processing industry. *Alvarez*, 339 F.3d at 905. In addition, district courts within the Fourth, Seventh, Ninth, and Eleventh Circuits have held that "changing clothes" does not include donning and doffing protective equipment. *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 930-31 (N.D. Ill. 2003); *Fox v. Tyson Foods, Inc.*, 2002 WL 32987224 *6 (N.D. Ala. 2002); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 866-68 (W.D. Wisc. 2007); *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1205 (N.D. Cal. 2007); *Maciel v. City of Los Angeles*, 542 F. Supp. 2d 1082, 1091 (C.D. Cal. 2008); *Perez v. Mountaire Farms, Inc.*, 2008 WL 2389798 at *5 (D. Md. 2008).

In direct contrast to these decisions, the Fourth, Fifth, and Eleventh Circuits have now held that donning and doffing protective gear constitutes "changing clothes" within the meaning of section 203(o). *Allen v. McWane*, 593 F.3d 449, 454 (5th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008) ("*Cagle's*"). Numerous district courts have also adopted this view. *See Sisk v. Sara Lee Corp.*, 590 F. Supp. 2d 1001 (W.D. Tenn. 2008); *Kassa v. Kerry*, 487 F. Supp. 2d 1063 (D. Minn. 2007); *Davis v. Charoen Pokphand*, 302 F. Supp. 2d 1314 (N.D. Ala. 2004); *Saunders v. John Morrell & Co.*, 1991 WL 529542 (N.D. Iowa 1991). The positions taken by the various circuits and their respective district

courts on this federal statutory provision are in direct conflict. This conflict has created great uncertainty for employers and employees attempting to discern their rights and obligations under the FLSA and for the courts charged with adjudicating these cases. Review by this Court is necessary to resolve the circuit split on this important issue.

B. In Conflict With Other Circuits, the Court Below Failed to Apply the Doctrine of Statutory Interpretation That Remedial Statutes Should Be Construed Liberally in Favor of Those They Are Intended to Protect.

The Fourth Circuit's opinion highlights a second split among the circuits regarding the appropriate standard of statutory interpretation in FLSA cases. On petition for rehearing, the workers argued that the Fourth Circuit failed to apply the appropriate standard of statutory interpretation to its reading of section 203(o). The court did so based in large part on an opinion of the Eleventh Circuit, which departed from the traditional standard of interpretation in FLSA cases. *See Cagle's*, 488 F.3d at 957. The case at bar and *Cagle's*, along with their progeny, have created a direct conflict with other circuits on this issue.

The standard for statutory interpretation of the FLSA flows from the long-accepted doctrine that a remedial statute is to be construed liberally in favor of those whom the statute is intended to

protect. This Court's precedent thus dictates that exceptions to FLSA coverage "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), *citing Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959). Some courts have interpreted these cases to require that they apply the same standard of interpretation to all exemptions from FLSA coverage, regardless of whether the exemption is created by the "Definitions" section of the statute ("Definitional Exemptions") or the "Exceptions" section of the statute ("213 Exemptions"). 29 U.S.C. § 213. These courts have held that there is no practical reason to differentiate between Definitional and 213 Exemptions, and have thus applied the same standard of interpretation to both categories. *See, e.g., Alvarez*, 339 F.3d at 905 (applied to interpretation of section 203(o)).

In direct contrast to this view, the Eleventh Circuit has taken the view, adopted by the Fourth Circuit in this case, that the remedial standard of interpretation applies only to inquiries into the meaning of section 213 of the FLSA. *Cagle's* 488 F.3d at 957; *Sepulveda*, 591 F.3d at 215. *Cagle's* makes a distinction between section 213, which lists employer exemptions under the Act, and the rest of the Act, which in large part defines employer coverage. *Cagle's* 488 F.3d at 957.

At least one federal district court has noted that, in the context of section 203(o), "reviewing courts are divided as to whether the provision

operates as an exemption or merely a definition and prerequisite for a finding of hours worked." *Gatewood v. Koch Foods of Mississippi, LLC*, 569 F. Supp. 2d 687, 692 (S.D. Miss. 2008). This split has generated significant conflict among the lower courts. Some courts have rejected *Cagle's* approach as illogical, holding that because there is no practical difference from the employee's perspective between being "exempted" from FLSA coverage and being "defined" out of coverage, the same standard of interpretation should apply to both categories of exemptions. For example, one case from the Middle District of Pennsylvania referred to Third Circuit precedent interpreting portions of section 203 as exceptions and concluded that "the language of § 203(o) demonstrates that it is an exclusionary clause of the FLSA." *In re Cargill Meat Solutions*, 2008 U.S. Dist. LEXIS 31824 at *44 (M.D. Pa. April 10, 2008). A district court in Maryland compared the standard of interpretation applied in *Alvarez* with the restrictive view applied in *Cagle's* and concluded, "*Alvarez* and its progeny, have the better of this dispute." *Perez*, 2008 WL 2389798 at *4. In contrast, other courts have chosen to follow *Cagle's* more restrictive standard of interpretation to Definitional Exemptions. *See, e.g., Salazar v. Butterball, LLC*, 2009 WL 6048979 (D. Colo. 2009).

While *Cagle's* suggests that a pro-worker orientation should not apply to an interpretation of section 203, the "Definition" subchapter, 488 F.3d at 957, Supreme Court precedent implies the contrary, that the remedial standard of interpretation applies to all forms of FLSA issues.

Although express application of this standard most commonly is noted in cases involving 213 Exemptions, courts apply the remedial standard to cases involving other aspects of FLSA interpretation. The Court has stated that "within the tests of coverage fashioned by Congress, the Act has been construed liberally." *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959); *see also Donovan v. I-20 Motels, Inc.*, 664 F.2d 957 (5th Cir. 1981)("The FLSA is to be liberally construed to provide broad coverage."). The Court has applied this standard to interpret numerous FLSA provisions. For example, in deciding whether employees "engaged in commerce" under sections 206 and 207 of the Act, the Court required that these provisions also be "construed liberally to apply to the farthest reaches consistent with congressional direction." *Mitchell*, 358 U.S. at 211.

Similarly, when interpreting the terms "employee" and "production" under the Definitions subchapter, this Court held that it must adopt "a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 (1944). Accordingly, it stated that "these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose" and that "such a statute must not be interpreted or applied in a narrow, grudging manner." *Id.* at 597.

Notwithstanding this precedent, the *Cagle's* line of cases has generated significant confusion and inconsistency among the lower courts regarding the correct standard of interpretation in FLSA cases. Indeed, the Fourth Circuit's opinion in this case conflicts with its own prior decisions. In one FLSA case, the Fourth Circuit had occasion to resolve questions of both a 213 Exemption (section 213(a)(2)) and a Definitional Exemption (section 203(s)(3)) in the same case. *Schultz v. W.R. Hardin & Son, Inc.*, 428 F.2d 186 (4th Cir. 1970). In *Schultz*, the Fourth Circuit applied a liberal standard favoring the employee to both sections of the statute, holding that "the Act's 'terms of coverage' must 'be liberally . . . construed.'" *Id.* at 189. In another case, the Fourth Circuit held that "[e]xemptions from or exceptions to the Act's requirements are to be narrowly construed against the employer asserting them." *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1267 (4th Cir. 1996) ("FLSA should be given a broad reading, in favor of coverage.") The contrast between these earlier Fourth Circuit opinions and its opinion in this case illustrates the extent of the uncertainty among the courts on this issue.

Which standard of statutory interpretation applies to section 203(o) is critical to resolution of this case. Under the remedial standard of interpretation, Allen would have the burden of establishing by "clear and affirmative evidence" that the section 203(o) exemption applies to it in this case. *Birdwell v. City of Gadsden*, 970 F.2d 802, 805 (11th Cir. 1992). In addition, it would

have the burden of establishing that its employees are "clearly and unmistakably within the terms and spirit of the exemption." *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 826 (11th Cir. 1988). Neither the plain meaning of the statute nor the legislative history indicates that Congress intended section 203(o) to apply to an employee's donning and doffing of special, cumbersome protective equipment over his or her ordinary clothes. *Accord Alvarez*, 339 F.3d at 905 (applied to interpretation of section 203(o)). Given the absence of any evidence indicating that Congress intended section 203(o) to apply to donning and doffing protective gear, Allen did not and could not meet this strict burden of proof. As such, the Fourth Circuit's decision not to apply the remedial standard of interpretation was determinative in this case.

As described above, several circuits, including the Eighth and Ninth Circuits, have interpreted precedent of the Court to require that they apply the remedial standard of statutory interpretation to all sections of the FLSA, including Definitional Exemptions. In contrast, the Eleventh and now the Fourth Circuits have declined to apply the remedial standard to Definitional Exemptions. These decisions have created a distinct split among the circuits with regard to whether the remedial standard of interpretation applies to Definitional Exemptions. This split has created uncertainty among the courts charged with interpreting section 203(o) and will create further uncertainty with regard to other sections of the FLSA. Review by

this Court is necessary to resolve the conflict between the circuits on this important and far-reaching issue.

II. REVIEW IS WARRANTED TO CLARIFY THAT THE "CONTINUOUS DAY RULE" REQUIRES THAT EMPLOYEES BE COMPENSATED FOR TIME SPENT DONNING, DOFFING, AND SANITIZING EQUIPMENT AFTER THE WORKDAY HAS INDISPUTABLY BEGUN AND BEFORE IT HAS ENDED.

The workers also seek review of the Fourth Circuit's failure to apply this Court's "continuous day rule" to this case to permit the workers to proceed with their claims for compensation for time spent donning, doffing, and sanitizing PPE and walking at times other than the beginning and end of each workday. Even if this Court were to hold that section 203(o) bars some of the workers' claims for compensation, such a bar would only apply to time spent changing clothes and washing "at the beginning or end of each workday." Therefore, Section 203(o) cannot be a bar to the workers' claims to compensation for time worked during the internal part of the workday. *Burks v. Equity Group*, 571 F. Supp. 2d. 1235, 1242 (M.D. Ala. 2008); *see also Alvarez*, 546 U.S. at 29.

This Court has adopted a "continuous day" rule, pursuant to which workers are entitled to compensation for all work time between the first

principal activity of the workday and the last – less a bona fide lunch break. *Alvarez*, 546 U.S. at 29.

Sanitizing protective gear is a principal activity for which workers are entitled to compensation, and at least one court has applied this principle in a FLSA case. *Burks*, 571 F. Supp. 2d at 1245. Section 203(o)'s exclusion for "washing" only precludes compensation for a worker washing his body, not sanitizing PPE. *See Gatewood*, 569 F. Supp. 2d at 702; U.S. Department of Labor Advisory Letter, FLSA 2002-2 (June 6, 2002), at 1 (attached as Appendix D).

Thus, in this case, the workers' "continuous day" would, at the latest, begin when the PPE is initially sanitized at the beginning of the day and end when the PPE is sanitized for the final time at the end of the day. The continuous, compensable day would therefore, at a minimum, include all time spent (i) initially sanitizing PPE, (ii) walking from that location to the production line,[1] (iii) partial doffing, donning, and sanitizing of the PPE before and after lunch,[2] (iv) walking to and from

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[1] In *Alvarez*, the Court held walking to be a compensable principal activity. 546 U.S. at 34.

[2] In *Burks v. Equity Group*, the district court held that section 203(o) was not a bar to an employee's compensation claim for time spent donning, doffing, and sanitizing protective equipment during his lunch period. In so holding, the court recognized that, by its terms, section 203(o) did "not apply to activities performed during the continuous workday." 571 F. Supp. 2d 1235, 1248 (M.D. Ala. 2008). *See also Fox*, 2002 WL 32987224 at *13 (regarding claim of working in poultry plant during meal break).

lunch, (v) walking from the line to the location where PPE is sanitized at the end of the day, and (v) sanitizing the PPE for a final time at the end of the workday. *See Gatewood*, 569 F. Supp. 2d at 702 n.32 (noting that because section 203(o) only applied to changing clothes at the beginning and end of each workday, "the Plaintiffs' remaining claims related to midday work breaks and unpaid waiting time at the beginning of each day are not impacted by" the court's section 203(o) analysis).

The Fourth Circuit erred in failing to apply the continuous day rule to this case. Indeed, it failed to discuss application of the rule at all; its only explanation for dismissing the workers' internal workday claims was in a footnote, where (with no analysis or factual basis) the court assumed that the time spent donning, doffing, sanitizing, and walking during the internal part of the workday was non-compensable as part of a bona fide meal period, or, in the alternative, *de minimis*. However the continuous day rule dictates that activities internal to the continuous workday cannot be carved out and discounted.

Even without including the time spent donning and doffing the PPE at the beginning and end of each workday, the workers spend considerable time internal to the workday donning, doffing, and sanitizing the PPE, and walking to and from their lockers to do so. The continuous day rule dictates that the workers are, at a minimum, entitled to compensation for the time internal to the workday spent on these activities. The Fourth

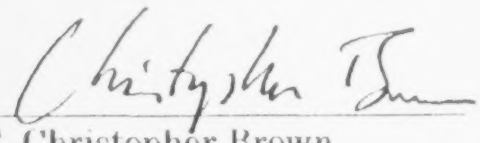
Circuit's failure to apply this rule to the present case directly contradicts clearly established precedent of this Court.

Failure to reverse the Fourth Circuit's unjustified dismissal of the workers' internal workday claims would have significant financial implications for thousands of workers, most of whom are the very low-wage employees whom the FLSA was primarily enacted to protect. Review of this Court is necessary to clarify that the continuous day rule applies to entitle workers to compensation for all activities that fall within the internal part of the continuous workday, even in cases where section 203(o) exempts some of these activities from coverage when performed at the beginning or end of the day.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant review of this matter.

Respectfully submitted,



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PETITION APPENDICES

Appendix A

Memorandum Opinion and Order of the United States District Court for the District of Maryland Dated September 16, 2008, and Filed September 17, 2008 ..... 1a

Appendix B

Opinion of the United States Court of Appeals for the Fourth Circuit Filed December 29, 2009 ..... 12a

Appendix C

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Appendix D

U.S. Department of Labor Advisory Letter, FLSA 2002-2 (June 6, 2002) 49a

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Filed 09/17/2008 Pages 1 of 11

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SANJUANITA SEPULVEDA, Individually and on Behalf of All Others Similarly Situated	*	
Plaintiffs	*	CIVIL ACTION NO. MJG-07-97
vs.	*	
ALLEN FAMILY FOODS, INC.	*	
Defendant	*	

* * * * * * * * * * * *

MEMORANDUM AND ORDER

The Court has before it Defendant's Motion for Summary Judgment and Motion to Decertify the Collective Action [Document 34], Plaintiffs' Cross Motion for Partial Summary Judgment [Document 35], and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

I. BACKGROUND

Employees of Defendant Allen Family Foods, Inc. ("the Company"), working in the Company's chicken processing facilities in Delaware, assert claims under the Fair Labor Standards Act ("FLSA"), at 29 U.S.C. §§ 207(a)(1) & 216(b), and Delaware law seeking the following three categories of relief:

1. Donning and Doffing - pay for time securing, donning and doffing certain protective gear and walking to and from work stations.

2. Lunch Break - damages for the Company's failure to provide a 30 minute lunch break because of time needed to doff and don protective gear during lunch time.

3. Post Work - pay for having to work "off the clock" at the end of a shift until a replacement arrived.

By the instant motions, the Company seeks summary judgment with regard to the FLSA claim and the Lunch Break claim, and seeks class decertification of the post work claims. Plaintiffs seek, by partial summary judgment, a holding that

"section 203(o)[1] of the Fair Labor Standards Act, 29 U.S.C. § 203(o), does not preclude plaintiffs - who are union members - from being compensated for time spent donning and doffing protective equipment." Pls.'s Mem.2[2] at 1.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2007). The well-established principles pertinent to such motions can be distilled to a simple statement.

The Court may look at the evidence presented in regard to the motion for summary judgment through the non-movant's rose colored glasses, but must view it realistically. After so doing, the essential question is whether the reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Adickes v.*

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[1] Discussed herein.

[2] Plaintiffs' Memorandum in Support of Their Cross Motion for Partial Summary Judgment [Document 35].

S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991).

II. DISCUSSION

A. Donning and Doffing

The Company requires its employees to wear the following (the Protective Gear") while working:

1. Safety, steel-toe shoes
2. USDA required smock
3. USDA required plastic apron
4. Safety glasses
5. Ear plugs
6. Bump cap
7. Hair net
8. USDA required rubber gloves
9. Sleeves
10. Arm shields

Pls.' Mem.[3] at 4-5.

Employees may take their Protective Gear home and wear most items traveling to and from the plant, *see* Morris Affidavit [Def.'s Mem., Ex. 1] at ¶¶

[3] Plaintiffs' Memorandum in Support of their Cross Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Partial Summary Judgment [Document 35, Ex. 1].

5-6. However, Plaintiffs have presented evidence, which the Court accepts in the instant summary judgment context,[4] that employees may not wear the smock and possibly the apron into the plant. *Id.* at ¶ 7. It appears that an employee donning the Protective Gear would put on the smock before donning the apron, sleeves, and gloves. *See* George Dep.; Thomas Dep.; Rice Dep.; Torres Rivera Dep.; Velasquez Dep.; White Dep.

It is undisputed that the Company pays no compensation for time spent donning and doffing the Protective Gear.

The United States Supreme Court has recognized that donning and doffing protective gear before or after a work shift can be compensable under the FLSA if it is an "integral and indispensable part of the principal activities for which" the employee has been hired. *Steiner v. Mitchell*, 350 U.S. 247, 335 (1956). However, Section 203(o) of the FLSA provides:

> Hours Worked.--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, THERE SHALL BE

---

[4] The Court notes the testimony of Tracy T. Morris, Allen's Vice President of Human resources, that smocks may be worn outside the plant if covered, for example by a coat.

> EXCLUDED ANY TIME SPENT IN CHANGING CLOTHES or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. (Emphasis added).

29 U.S.C. § 203(o).

Plaintiffs work under a collective-bargaining agreement and the Company has a custom of not providing paying compensation for donning and doffing time. Accordingly, the question presented is whether the donning and doffing of the Protective Gear at issue is "changing clothes" for purposes of Section 203(o). This question has been addressed in published decisions by the Ninth and Eleventh Circuit Courts of Appeal reaching different results. The Fifth Circuit has issued a one line unpublished decision and the matter has not been presented to the United States Court of Appeals for the Fourth Circuit.

The Ninth Circuit, in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)(Section 203(o) issue not addressed by the Supreme Court), held that Section 203(o)

provided an exception to the FLSA so that the burden was on the employer to prove that the activity in question constituted "changing clothes." The Ninth Circuit concluded that the term "clothes" was to be construed narrowly and that in *Alvarez* - involving meat packing protective gear - donning and doffing time was compensable under the FLSA.

More recently, the Eleventh Circuit, in *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), held that Section 203(o) was a definitional provision so that the burden remained with the employee to prove that the activity in question did not constitute "changing clothes." The Eleventh Circuit concluded that the term "clothes" was to be construed broadly and that in *Cagle's* - involving protective gear for workers in a chicken processing plant - donning and doffing time was not compensable.

The Fifth Circuit was faced with the donning and doffing issue in *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Texas 2001), *aff'd*, 44 Fed. Appx. 652, 2002 WL 1396949 (5th Cir. 2002) in which the trial judge had held for the employer. The one sentence unpublished decision of the Fifth Circuit is: "We affirm for essentially the reasons stated by the careful opinion of Judge Hannah."

There are a few district court decisions that take a somewhat pro-Plaintiff approach to Section

203(o). For example, *see Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860 (W.D. Wisc. 2007). Moreover, Judge Davis of this Court, in a pending donning and doffing case involving chicken processing plant employees, *Perez v. Mountaire Farms, Inc.*, AMD-06-121 (D. Md.), denied summary judgment to the employer.

In some cases, district courts have held that the items at issue are "clothes" for purposes of Section 203(o), but left the determination to the jury of whether nonpayment for the donning and doffing such clothes constituted "custom and practice" under the collective bargaining agreement, *see, Figas v. Horsehead Corp.*, No. 06-1344, slip op. 2008 WL 4170043 (W.D. Pa. Sept. 3 2008) (granting in part summary judgment to the employer and holding that the term "clothes" must be construed broadly to include protective clothing, but nonpayment for time spent donning and doffing did not indicate "custom and practice"), *see also, Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063 (D. Minn. 2007).

In the current decisional landscape, the Court finds it appropriate to follow the Eleventh Circuit until the matter is addressed by the United States Court of Appeals for the Fourth Circuit so as to avoid the substantial possibility of unnecessary trial proceedings.

Accordingly, the Court concludes that it should grant summary judgment to the Company on the donning and doffing claim.

B. Lunch Break

Under the Delaware Meal Break Act, 19 Del. Code § 707, "[a]n employer must allow an employee an unpaid meal break of at least 30 consecutive minutes, if the employee works 7 ½ or more consecutive hours." Plaintiffs contend that the Company did not provide the required 30 consecutive minute lunch break because of the time necessary to take off and put back on the Protective Gear during the 30 minute lunch break.

There does not appear to be clear authority on the question of whether the Delaware statute provides a vehicle for a private cause of action. And, there would be significant issues presented if there were a private cause of action.[5]

---

[5] For example, whether donning and doffing time that is not compensable under the FLSA by virtue of Section 230(a) would, nevertheless, be compensable under the Delaware Meal Break Act and whether, in the instant case, the amount of time needed for donning and doffing during the lunch break would be *de minimis*. *See E. I. Du Pont De Nemours & Co. v. Harrup*, 227 F.2d 133, 136 (4th Cir. 1955) (ten minutes of uncompensated work was *de minimis*).

The Court concludes that, in the absence of a clear indication that the Delaware statute was intended to create a private cause of action and the decision to grant summary judgment on the donning and doffing claims, it is not appropriate to proceed with the Delaware Meal break Act claims.

C. Post Work

Plaintiffs presented a claim for pay for having to work "off the clock" at the end of a shift until a replacement arrived.

In the papers filed regarding the instant motions, Plaintiffs state that "at this stage [they] do not seek collective-action status for their claims of being required to work off the clock (other than doffing, sanitizing and walking) at the close of the line." Pl. Mem. at 30. At the hearing Plaintiffs counsel stated that Plaintiffs do not wish to present individual "post work" claims in the instant case.

The Court will, therefore, dismiss Plaintiffs' "post work" claims without prejudice.

IV. CONCLUSION

For the foregoing reasons,

1. Defendant's Motion for Summary Judgment [Document 34] is GRANTED.

2. Defendant's Motion to Decertify [Document 34] is DENIED AS MOOT.

3. Plaintiffs' Cross Motion for Partial Summary Judgment [Document 35] is DENIED.

4. Judgment shall be entered by separate Order.

SO ORDERED on Tuesday, September 16, 2008.

/s/
Marvin J. Garbis
United States District Judge

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Date Filed: 12/29/2009 Page: 1

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SANJUANITA SEPULVEDA; ANGELA SALINAS; JOSE SANCHEZ RIVERA, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED; DAVID BAILEY; SEAN BRADHAM; CLARA BENNETT; VICTOR BURGOS RIVERA; VENCE BYRD; HADA CARDENAS; ANGEL COLMENARES; YACHIRA DAVILA; HECTOR ESMURRIA; GARVINA GIBBS; MARGARET GIBBS; ROGER GONZALES; PATRICIA GUTIERREZ; SELENA HANCOCK; CESAR HERNANDEZ; PATTIE HINTON; WILLIAM JACKSON; THOMAS JACOBS; ROBIN LOTT; MARICRUZ LUYANDO; MARIA MEJIA; LARRY MILLER; JOANA NIEVES; KECLAINE NORMIL; SERGE NORMIL;	No. 08-2256

KENNY ORTIZ; ADA ROSA BATIZ ORTIZ; ANGEL PEREZ; MARIANO PEREZ; TROY PHILLIPS; SONIA CORTES PICART; ELOINA RAMIREZ; MANUEL RAMIREZ; JESSICA RENTAS; GLORIMAR RIVERA; MYRIAM RIVERA; ALEJANDRO ESCALANTE ROBLERO; JOSE SANCHEZ; ALAN SAVAGE; PEDRO BARRETO TIADO; MARIA DEL TORRES CARMEN; ASUNCION TORRE; CORTEZ TRUITT; JOSE VALENTIN; MONSERRATE VELEZ; ROLAND WOODS; NORA L. ALVARADO; LUIS RIVERA FLECHA; ALEJANDRO TZUM VICENTE; IVONNE GONZALEZ; MIGUEL MARTIN LEON; OLGA MALPICA; FRANCISCA PEREZ; JOSE RICO; EVELYN TRINIDAD LIERAS; MARIZOL ZAYA JIMENEZ; JOSE J. CASTRO; DIANIRA COTTO DIAZ; ENIS DALISJO VALLES; MOISES FLORES CARBONELL;

EMELDA GOMEZ; JOHNNY LUPO LEON; SERAFIN MORALES; FELIX QUINTANA MALDONADO; ESSAU RIVERA; ALEXIS ALAMEDA; ESPERANZA ALVAREZ; LORY ALVINO-LOPEZ; RAMON CRUZ SERGES; JOHNNY HUERTAS; EDGARDO JIMENEZ MOLINA; FERNANDO NATARENO; ALICIA ORTIZ SANCHEZ; JULIO REYES PEREZ; ALBERT TORRES MORALES; HECTOR S. VELASQUEZ; JENNIFER VALENTIN VELEZ; CARMEN ACEVEDO; CELINES LOPEZ CARMONA; ROBERTA MARTINEZ; ELIZABETH MEDELLIN; KEILA MONTANEZ SANTOS; YESENIA VEGA; GLADYS ARROYO; KARINA BELASKES PIRIS; JOSE O. GARCIA; SUZETTE GARCIA BARBOSA; SANTOS GRAMAJO MAZARIEGOS; MICHAEL GUERENA PAGAN; MANUEL J. HERNANDEZ; GLORIA

KIDWELL; VERONICA S LUGO; JORGE E. MEDINA GONZALEZ; PEDRO C. NIEVES; RODOLFO RAMIREZ LOPEZ; JUDY C. RAMOS; WILFREDO J. RODRIGUEZ; JOSE LUIZ SANCHEZ; HARRY SANTIAGO; REBERT AMISIAL; ROSITA AMISIAL; KENNETH A. ARMSTRONG; DAVID W. BADGER; DOROTHY M. BAILEY; FILOMENA BARTOLON; MARTHA BELL; MARIA BERDUO; GALEN BYERLY; DIEUNATHAN CUSTIN; HECTOR COLON CLASS; JAIRO CORADO; ALLISON M. DAVIS; LIONEL BUENO; MIMOSE DELIUS; MARILITZA FERRER FIGUEROA; GERALDINE FOREMAN; CHARLES D. FREEMAN, VIRGINIA GAONA; BURNELL GIBBS; ELIZABETH GONZALEZ-COLON; ABILIO HERNANDEZ; ALEJANDRA HIDALGO; KATHY D.

HOUCHENS; LOLA M. JACKSON; ARTHUR JOHNSON; MARVIN KEATON; MARIA A. LAGUNAS; SHEILA J. LOPEZ; TITO LOPEZ; WANDA IVETTE LUCIANO SOLIS; LEROY MANN, SR.; JEAN MARCELIN; MARCELINA L. MARIOT; LORRAINE MILES; SAMANTHA MIRELES; EDUARDO MORALES; NANCY ORTIZ NIEVES; LAINYA NOEL; HERIBERTO C. OLIVO; MARILYN ORTIZ RODRIGUEZ; SHARON N. ORTIZ; LARRY D. PARKER; YAHAIRA PAGAN; VAINQUEUR PAUL; METELLUS PIERRE-LOUIS; GLADYS E. RAMOS; LUZ N. RAMOS ORTIZ; IVONIA RAYMOND; ALEXANDER J. RICHARDSON; JEAN RICHE; LULA RIDDICK; WALTER RIVERA ROSA; CHRISTINE ROUNDTREE; RAFAEL R. SANTIAGO; PELIZIA SATIRIN; ELAINE SHEPPARD; SAIDA SOTO; ESTHER RE SUTTON;

CHARLIE THOMAS; JONATHAN TORRES FIGUEROA; MATTHEW D. TRAGO; SILVIA TRUITT; JACKIE D. TULL; MARIO VELASQUEZ; ROBERTO VELASQUEZ FIGUEROA; LUCIEN VERNET; ELIZABET VITEL ALEX WASHINGTON RUTH; ANN WHITE; GARY D. WILLIAMS; LINDA WOODS; ELIOT YASE VELEZ; YAHAIRA NAVARRO GONZALES; LIDIA NUNEZ RODRIGUEZ; JUAN RODRIGUEZ; GLADYS M. STEPHENS; AIDA N. TEXEIRA MELENDEZ; FREDDIE A. TORRES; JIMMIE TORRES RIVERA; JONATHAN D. TRAVIES; CEFERINO J. VASQUEZ; BRIAN WILLIAMS; AGAPITO ALVARADO; LAURA ASCENCIO; CLINTON A. BECKETT; EDWIN BORRERO; JOSE CABALLERO; CHRISTIAN CAJIGAS; ANDREA CARTER; GLORIA CASTANEDA; JACOB CEUS;

EDUARDO COLON RIVERA; YAJAIRA CRUZ; LUCY CRUZ HIRALDO; THOMAS DANIELS; LIANETTE DE JESUS; JANNIE M. EVANS; CHARITABLE EXANTUS; WANDA FERNANDEZ; FRANCISCO R. FERRER; LEFILS FLORES; MARCELLUS M. FOOKS; ELI S. GARCIA; MANUEL GAUCIN; ROBERT GEDEON; ANNIE GEORGE; NORMA I. GIRALD; JAMES A. GREEN; ANNETTE GUSTIN; JACQUELINE GUSTINE; HAROLD A. HARRIS; JEAN A. LARKIN; KEITH P. LOFLAND; ESTEL MAXION; ARACELI MEDELLIN; DONNEIL MARK MURRAY; RAMON OLIVA; MARTA ORTIZ; FLORA ORTIZ MORALES; ANGEL LUIS PEREZ; ARCHIBALD PIERRE; ODETTE PIERRE; CHARLES L. PINDER; JACQUELINE REGUSME; GLECERIA V. REYES; ROBERTO DENNIS RIVERA; RAUL M.

RODRIGUEZ; WANDA RODRIGUEZ; JAHAIRA RODRIGUEZ CONDE; SAMUEL ROQUE-RAMOS; SAMUEL ROQUE-RAMOS; MARCOS A. SANTIAGO; BRENDA SHIELDS; WILLIAM HENRY TEAGLE; WILLMARI TORRES REYES; HAMARA VAZGUEZ; ELIMAS VELASQUEZ; JULIO M. VELASQUEZ; WILLIAM L. BAGWELL, JR.; SHARLENE DIAL; JEFFREY HANCOCK; LAVERNE HARRIS; HARRY ORTIZ; JOSE RAMIREZ CHRISTINA RODRIGUEZ; CARL STALLINGS,

Plaintiffs-Appellants,

v.

ALLEN FAMILY FOODS, INCORPORATED,

Defendant-Appellee.

Case: 08-2256 Document: 40
Date Filed: 12/29/2009 Page: 9

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, Senior District Judge.
(1:07-cv-00097-MJG)

Argued: October 28, 2009

Decided: December 29, 2009

Before WILKINSON and NIEMEYER,
Circuit Judges, and Anthony J. TRENGA,
United States District Judge for
the Eastern District of Virginia,
sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Trenga joined.

COUNSEL

ARGUED: C. Christopher Brown, BROWN, GOLDSTEIN & LEVY, LLP, Baltimore, Maryland, for Appellants. Arthur Mortimer Brewer, SHAWE & ROSENTHAL, LLP, Baltimore, Maryland, for Appellee. **ON BRIEF:** Jane R. Flanagan, BROWN, GOLDSTEIN & LEVY, LLP, Baltimore, Maryland, for Appellants. Eric Hemmendinger, Teresa D. Teare, SHAWE & ROSENTHAL, LLP, Baltimore, Maryland, for Appellee.

OPINION

WILKINSON, Circuit Judge:

Under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (2006), employers and unions may agree through collective bargaining to exclude "any time spent in changing clothes . . . at the beginning or end of each workday" from compensable work time. § 203(o). In this case, we are asked to determine whether the donning and doffing of protective gear at a poultry processing plant constitutes "changing clothes" within the meaning of Section 203(o). We conclude that it does. Consequently, the employer and union here may–as they currently have–exclude donning and doffing from compensable work time.

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Date Filed: 12/29/2009 Page: 11

Our holding, of course, does not mean that employees should not be paid for time spent donning and doffing protective gear. Instead, it simply recognizes that the purpose of Section 203(o) is to leave this issue to the collective bargaining process. Employers and unions are free to determine for themselves how much compensable time should be allocated and for what activities of "changing clothes." This sort of fact-intensive determination has classically been grist for the mill of collective bargaining, and Congress ensured that employers and unions could keep it that way by enacting Section 203(o).

I.

Allen Family Foods, Inc. ("the company") is engaged in the business of processing poultry. It operates several plants, including one in Harbeson, Delaware that employs approximately 1,200 people. A production line conveys poultry through this plant for processing and then packaging for eventual distribution.

The employees who work on the production line are required to wear the following items: (1) safety, steel-toe shoes, (2) a United States Department of Agriculture (USDA) required smock, (3) a USDA required plastic apron, (4) safety glasses, (5) ear

plugs, (6) a bump cap, (7) a hair net, (8) USDA required rubber gloves, (9) sleeves, and (10) arm shields. The company commonly refers to these items as either "protective gear" or "personal protective equipment."

At the beginning of each workday, production employees must don these items. They typically do so in the plant's locker room or as they walk from the locker room to the production area. Once they enter that area, they sanitize their gear by dipping their gloves into a tank, splashing the liquid solution onto their aprons, and stepping through a footbath. Afterward, they take their places along the production line and begin the task of processing poultry.

Each day, the employees receive a thirty-minute lunch break, during which no chickens are placed on the production line. Employees are free to leave the production area when the last chicken passes their stations but are expected to be back when the first and then walk to the cafeteria. Upon returning to the production area, they put these items back on and then sanitize them before resuming work. At the end of each workday, the employees are not required to go through a particular routine. But they typically rinse and doff their gear before leaving the plant.

The company has a long-standing practice of paying these employees on the basis of "line time. That is, it pays them for time spent processing chickens on the production line; it does not pay them for time spent donning and doffing protective gear, walking to and from the production area, or washing their gear before or after work. Employees also do not receive compensation during the lunch break.

Donning and doffing time has been the subject of collective bargaining at the Harbeson plant. In 2002, United Food and Commercial Workers Local 27, which represents most of the production employees at the plant, proposed that its members be paid for twelve minutes of donning and doffing time per day. The company and the union did not agree to that proposal, however.

In January 2007, three production employees filed a collective action against the company under 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA"). They were joined by approximately 250 current and former production workers who opted in to the action (collectively "the employees"). The employees claimed, among other things, that the company had violated the FLSA by not compensating them for time spent donning and doffing their protective gear.

After discovery, the company moved for summary judgment. Its primary argument was that its pay practices were permissible under 29 U.S.C. § 203(o) of the FLSA, which allows employers and unions to exclude "any time spent in changing clothes . . . at the beginning or end of each workday" from compensable work time. In response, the employees sought, by cross motion for partial summary judgment, a holding that Section 203(o) did not bar their suit. The main issue of contention was whether donning and doffing protective gear constituted "changing clothes" within the meaning of the section.

Adopting the Eleventh Circuit's analysis *in Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), the district court held that the donning and doffing of the protective gear was "changing clothes." Accordingly, it entered summary judgment for the company. The employees now appeal.

II.

We begin with a brief overview of the relevant statutory provisions. The FLSA guarantees covered employees a minimum hourly wage for their work and entitles them to one and one-half times their regular wage for overtime. 29 U.S.C. §§ 206, 207. A recurrent question under the Act has been when the

compensable workday begins and ends. The question often arises where, as here, employees perform some tasks before productive work begins.

The FLSA does not define "work" or "workweek." But two statutory provisions do bear directly on the question of when the compensable workday begins. The first is Section 254 of the Portal-to-Portal Act, 29 U.S.C. §§ 251-62, which amends the FLSA. It provides, among other things, that employers are not required to pay their employees for "activities which are preliminary to or postliminary to" the principal activities for which they are employed, unless the employer agrees to do so. § 254(a)(2),(b). Under this provision, activities like changing clothes and washing which are performed before or after the regular work shift are "ordinarily" considered preliminary or postliminary activities and are therefore "excluded from compensable work time" by default. *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956). Changing clothes and washing are not so excluded, however, if they are "an integral and indispensable part" of an employee's principal activities. *Id.* at 256.

The second is Section 203(o) of the FLSA. This section provides:

> Hours Worked.—In determining for the purposes of [the minimum wage and overtime provisions] of this title the hours for which an employee is employed, *there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday* which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o) (emphasis added).

While these two provisions both bear on whether changing clothes and washing count as part of the compensable workday, they operate in different yet interrelated ways. As the Supreme Court has noted, Section 203(o)'s "clear implication is that clothes changing and washing, which are otherwise a part of the principal activity [under the Portal-to-Portal Act], may be expressly excluded from coverage by agreement." *Steiner*, 546 U.S. at 255. That is, even if changing clothes and washing are "integral and indispensible" and therefore not excluded from work time by default under the Portal-to-Portal Act, an employer and union may nonetheless "opt out" by

excluding such time under their collective-bargaining agreement. *See Livadas v. Bradshaw*, 512 U.S. 107, 131 (1994) (describing Section 203(o) as an "opt out" provision).

In this case, either provision could potentially exclude the time that the employees spend donning and doffing. It is an open question in this circuit whether donning and doffing protective gear is a preliminary or postliminary activity or "integral and indispensible" to the principal activity of poultry processing. If it is the former, then time spent on the activity is excluded by default under the Portal to Portal Act. The district court did not reach that question, however, and we need not do so here. For whatever the applicability of the Portal-to-Portal Act exclusion, the time spent on these activities may be excluded from the compensable workday if Section 203(o) applies.

Section 203(o) applies to donning and doffing of protective gear at the beginning and end of each day if two conditions are met. First, these activities must constitute "changing clothes" within the meaning of the statute. Second, time spent on these activities must be excluded from the workday by the express terms of or the customs and practices under a bona fide collective bargaining agreement.

The employees concede the existence of such a custom or practice and for good reason. *See* Br. of Appellants at 8 n.2 ("Plaintiffs do not contest the 'custom or practice' part of the exclusion."). The company's practice of paying the employees on a "line time" basis is long-standing. While one of the unions at the plant proposed adding donning and doffing time, this proposal was never agreed upon, and the custom or practice remains in place.

The question presented in this case, therefore, is whether donning and doffing protective gear counts as "changing clothes." If so, then time spent on these activities is not compensable under the FLSA.

III.

The employees argue that Section 203(o) does not apply for two main reasons: the items at issue are not "clothes" and the act of donning and doffing them is not "changing." We disagree on both points. In our view, Section 203(o) was intended to leave the compensability of this very sort of activity to the collective-bargaining process.

A.

"We begin, as always, with the text of the statute." *Permanent Mission of India to the United Nations v.*

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City of New York, 551 U.S. 193, 197 (2007). The statute does not define the phrase "changing clothes." Accordingly, we apply the "fundamental canon of statutory construction" that "words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979).[1]

We first turn to the plain meaning of the word "clothes." A leading dictionary defines "clothes" as "clothing," which in turn is defined as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time." Webster's Third New International Dictionary 428 (unabridged) (1986) [hereinafter Webster's]. Like the Fifth and Eleventh Circuits, we

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[1] The employees urge us to construe Section 203(o) narrowly in order to effectuate the remedial purposes of the FLSA. As they acknowledge, however, not all courts have applied this standard of interpretation to Section 203(o) because the section simply defines "Hours Worked" rather than exempting entire categories of employees from FLSA's protection. *Compare Anderson*, 488 F.3d at 957 (declining to apply the standard), with *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (applying the standard). We need not enter this debate. Even if this standard of interpretation applies, we still must "giv[e] due regard to the plain meaning of statutory language and the intent of Congress." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

conclude that this definition is "consistent with the common understanding of the word." *Anderson*, 488 F.3d at 955; *see also Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) (adopting this definition). This definition certainly encompasses the items which are at issue here. All the required items serve as "covering." The shoes, smocks, aprons, gloves, and sleeves easily qualify as "garments," while the bump caps, ear plugs, hairnets, arm shields, and glasses fall comfortably within the category of "accessories."

The employees argue that the "plain text" of the statute "does not permit" this interpretation. Br. of Appellants at 15. In their view, "clothes" encompasses only "regular undergarments and outerwear" of the sort "that one would wear on the street." *Id.* at 15, 17. While this definition might embrace standard company uniforms, their argument goes, it excludes items worn for protection from hazards in the workplace. We find this cramped interpretation of the term "clothes" unpersuasive for two main reasons.

First of all, we fail to see why the term "clothes" would refer to only "ordinary" or "street clothes." *Id.* at 15, 16. The statute does not use such qualifying adjectives; nor shall we. The statute explicitly refers to "changing clothes . . . at the beginning or end of each *workday*." § 203(o) (emphasis added). It is

obvious from both the language and the subject matter of the statute that Congress was talking about work clothes and not, say, just street clothes or pajamas. The statute encompasses precisely the sort of clothes that people wear to, at, or from work, which are often quite different from the sort that people wear on their own time.

Second, "we see no need to distinguish uniforms from protective clothes." *Anderson*, 488 F.3d at 955. Clothes commonly protect the people who wear them, either from weather conditions or physical hazards, and the fact they are worn for that very purpose does not mean that they cease to be clothes. "A cloth jumpsuit, for instance, is probably clothing even if worn by a car mechanic as protection from oil and grease." *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063, 1067 (D. Minn. 2007). Likewise, a steel-toe boot is clothing even if worn as protection from hazards on the factory floor. We fail to see, therefore, how protective clothing is somehow not clothing. This fact is illustrated by federal regulations which the employees themselves cite in support of their position. Br. of Appellants at 20 n.5. The Occupational Safety and Health Administration, for example, defines "personal protective equipment" as "specialized *clothing* or equipment worn by an employee for protection against a hazard." 29 C.F.R. § 1910.1030(b) (emphasis added).

Section 203(o) makes no distinction between protective and non-protective clothes. That provision "simply uses the term 'clothes,' which would seem to indicate that it includes all clothing, including that which also constitutes personal protective equipment." *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *10 (W.D. Pa. Sept. 3, 2008) (emphasis omitted). Because many work clothes are protective to some extent, the distinction urged upon us by the employees would be difficult, if not impossible, for courts to administer in a consistent and coherent manner. As counsel for the employees acknowledged at oral argument, the steel-toe shoes at issue here could be reasonably classified as either "normal" clothes or "protective gear." So too could the aprons, smocks, or rubber gloves. These are but a few examples of the many difficult determinations that courts would be required to make were we to adopt the employees' piece-by-piece approach to clothing.

This case, by contrast, involves a straightforward application of the statutory text. It concerns what other courts have described as "standard safety equipment." *See Reich v. IBP, Inc.*, 38 F.3d 1123,

1125 26 (10th Cir. 1994).[2] Like the Eleventh Circuit, we conclude that these items "fit squarely" within the definition of "clothes." *Anderson*, 488 F.3d at 956.[3]

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[2] The employees rely heavily on the Ninth Circuit's decision in *Alvarez*, which holds that the protective items worn in the beef and pork industries are not "clothes" within the meaning of Section 203(o). 339 F.3d at 904-05, *aff'd on other grounds*, 546 U.S. 21 (2005). We need not adopt either the Ninth Circuit's holding or rationale to note that appellants' reliance is misplaced. In *Alvarez*, the Ninth Circuit distinguished between "non-unique gear" such as hardhats and safety goggles and "unique gear" such as metal-mesh leggings and Kevlar gloves. *Id.* at 903. With respect to the non-unique items, it held that time spent donning and doffing was "non-compensable as *de minimis*." *Id.* at 904. Thus, if the items in this case qualify as non-unique (which they certainly do), then the Ninth Circuit reaches the conclusion that the employees are not entitled to compensation, albeit for a different reason.

[3] Our interpretation of the term "clothes" is consistent with that of the Department of Labor, the agency responsible for administering the FLSA. *See* Fair Labor Standards Act, U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2002-2 (June 6, 2002) ("[W]e interpret 'clothes' under section 3(o) to include items worn on the body for covering, protection, or sanitation . . . ."); *see also* Fair Labor Standards Act, U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2007-10 (May 14, 2007) (reiterating this view). We recognize that the Department has not always held this view. *See* Fair Labor Standards Act, U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. (Dec. 3, 1997) ("[S]ection 3(o) does not encompass protective safety equipment . . . ."); *see also* Fair

We now turn to the plain meaning of the term "changing." To "change" means "to make different," that is "to modify in some particular way but short of conversion to something else." Webster's 373; *see Anderson*, 488 F.3d at 956 (adopting this definition). The employees contend, however, that the term "changing" requires the exchange or substitution of one item for another. In their view, simply layering protective gear on top of one's clothes does not count as "changing."

We reject this narrow definition. "Nothing in the statute's language suggests that its application turns on whether one must fully disrobe or exchange one shirt, for example, for another." *Id.* at 956. And it would make little sense for the statute to impose such a requirement. If it did, compensation for putting on a company-issued shirt might turn on something as trivial as whether the employee did or did not take off the t-shirt he wore into work that day. Thus, "we conclude that one need not exchange

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Labor Standards Act, U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. (Jan. 15, 2001) (reiterating this view). The Eleventh Circuit found the more recent letter "more persuasive than the earlier ones." *Anderson*, 488 F.3d at 957. Whatever may be the case, our own view rests upon the language of the statute, not upon the gyrating agency letters on the subject.

clothes to change clothes for purposes of applying § 203(o)." *Id.* Rather, one can also change something by modifying it. Accordingly, the employees' act of donning and doffing their equipment fits comfortably within the meaning of "changing."[4]

B.

Our reading of the text finds additional support in the purpose of Section 203(o), made evident by the

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[4] The employees also contend that the term "washing" in Section 203(o) does not apply to their act of washing gear at the beginning and end of each shift. Like the word "clothes," the word "washing" is not qualified. We see no reason, therefore, to treat "washing" differently than "clothes." The basic problem with the employees' complaint is that it seeks to qualify the words "washing" and "clothes," but the statute simply does not read that way.

Lastly, the employees seek compensation for the time they spend during their lunch breaks donning and doffing a few items, washing, and walking to and from the cafeteria. This time is non-compensable, however, because it is part of a bona fide meal period, *see* 29 C.F.R. § 785.19 ("Bona fide meal periods are not worktime."), and, in the alternative, *de minimis*. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.").

circumstances leading to its enactment. Both Section 203(o) and the Portal-to-Portal Act, enacted two years earlier, were intended to give employers and employees greater latitude to determine when the work day begins and ends. Were we to adopt the appellants' reading of Section 203(o)'s text, we would undermine rather than respect that purpose.

As noted above, the FLSA, which was enacted in 1938, does not define the terms "work" or "workweek." The Supreme Court defined these terms "broadly" in its early FLSA cases. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). It defined them so broadly, in fact, that Congress found it necessary to amend the statute to restore some sanctity to private employment contracts.

Most relevant here, the Court held in 1946 that "the statutory workweek" included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). As a result, time spent performing "preliminary activities" after arriving at the workplace such as "putting on aprons and overalls, removing shirts, taping or greasing arms, [and] putting on finger cots" counted as work. *Id.* at 692-93.

Many employers, however, did not have a custom or practice of paying their employees for such preliminary activities. Consequently, they faced a flood of FLSA suits following the *Mt. Clemens* decision. "By some reports, claims totaling a billion dollars on behalf of industrial employees were filed" by the end of 1946. Leah Avey, Note, *Walk to the Line, Compensable Time: Cash in the Pockets of Employees*, 32 Okla. City U. L. Rev. 135, 142 (2007).

In 1947, Congress reacted to this situation by passing the Portal-to-Portal Act. There Congress found that the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. § 251(a). With respect to existing claims, Congress provided that "[n]o employer shall be subject to any liability or punishment" for failing to pay their employee for time that had not been compensable under then-existing contracts, customs, or practices. § 252(a). With respect to future claims, Congress provided that employers would not be required to pay their employees for, among other principal activity or activities." § 254(a)(2). Whether those activities were compensable was restored to the realm of contract, custom, and practice. § 254(b).

Two years later, Congress continued its effort to restore sanctity to private agreements by adding Section 203(o) to the FLSA. The sponsor of the amendment stated that its purpose was to "avoid[] another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11210 (1949) (comments of Representative Herter). He observed that many employers and employees had "carefully threshed out" through the collective-bargaining process whether "the time taken to change clothes . . . is considered a part of the working day." *Id.* The language of Section 203(o) is thoroughly reflective of that purpose. Like the Portal-to-Portal Act, Section 203(o) reflects Congress's intention to give private parties greater discretion to define the outer limits of the workday

The reasons behind this legislative judgment are not difficult to discern. First of all, Congress recognized that employers and unions are in a better position than either courts or agencies to "thresh[] out," *Id.*, how many minutes of compensable time to allocate to which tasks of "changing clothes." While employers and employee representatives can tailor solutions at the bargaining table to fit their particular circumstances and while negotiating parties can modify those solutions to address changing conditions, courts and agencies would find themselves in a morass of difficult, fact-specific

determinations if they were ultimately charged with deciding whether and how much of this time was compensable. In short, the statute evidences a preference for private resolution of such workplace concerns, rather than management of small increments of time and particular items of clothing through the judiciary.

Second, collective bargaining allows employers and unions to reach agreements that leave both sides more satisfied than a government-imposed solution would. A union, for instance, may be willing to trade off compensation for changing clothes in return for such other objectives as higher hourly wages, enhanced benefits, or improved working conditions—as one of the unions in this very case apparently did. And an employer may be willing to offer a higher hourly wage or other benefits in lieu of compensating employees for changing clothes, given that this activity may be difficult to monitor. Taking this issue out of the give and take of the collective bargaining process and putting it in courts or agencies could preclude such flexible and mutually preferable agreements.

Finally, the issue here is not whether employees should wear protective gear or whether the government may mandate that they do so. It is

simply "whether [employees] should be compensated for the time they spend doing so." *Figas*, 2008 WL 4170043, at *10 n.12. And Congress has concluded that employees would be better off if this issue were subject to collective bargaining. For, "[i]t would disserve the workers the Fair Labor Standards Act is meant to protect if employers who wished to introduce . . . more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear." Fair Labor Standards Act, U.S. Dep't of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA2002-2 (June 6, 2002). This sort of disincentive to workplace safety is not one that courts should casually introduce, especially in the face of a clear and contrary congressional mandate by Section 203(o).

IV.

For the reasons above, we find that the activity of donning and doffing protective gear constitutes "changing clothes" within the meaning of Section 203(o) and is therefore not compensable under the prevailing customs or practices at the Harbeson plant. We stress that our decision does not leave these employees without protection. It simply recognizes that Congress has made a policy choice that, when it comes to time spent changing clothes

and washing, the respective interests involved are best protected through the collective-bargaining process and the agreements negotiated pursuant thereto.

Accordingly, the judgment of the district court is

AFFIRMED.

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FILED: February 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2256
(1:07-cv-00097-MJG)

SANJUANITA SEPULVEDA; ANGELA SALINAS, JOSE SANCHEZ RIVERA, individually and on behalf of all similiary situated; DAVID BAILEY; SEAN BRADHAM; CLARA BENNETT; VICTOR BURGOS RIVERA; VENCE BYRD; HADA CARDENAS; ANGEL COLMENARES; YACHIRA DAVILA; HECTOR ESMURRIA; GARVINA GIBBS; MARGARET GIBBS; ROGER GONZALES; PATRICIA GUTIERREZ; SELENA HANCOCK; CESAR HERNANDEZ; PATTIE HINTON; WILLIAM JACKSON; WILLIAM JACKSON; THOMAS JACOBS; ROBIN LOTT; MARICRUZ LUYANDO; MARIA MEJIA; LARRY MILLER; JOANA NIEVES; KECLAINE NORMIL; SERGE NORMIL; KENNY ORTIZ; ADA ROSA BATIZ ORTIZ; ANGEL PEREZ; MARIANO PEREZ; TROY PHILLIPS; SONIA CORTES PICART; ELOINA RAMIREZ; MANUEL RAMIREZ; JESSICA RENTAS; GLORIMAR RIVERA; MYRIAM RIVERA; ALEJANDRO ESCALANTE ROBLERO; JOSE SANCHEZ; ALAN

SAVAGE; PEDRO BARRETO TIADO; MARIA DEL TORRES CARMEN; ASUNCION TORRE; CORTEZ TRUITT; JOSE VALENTIN; MONSERRATE VELEZ; ROLAND WOODS; NORA L. ALVARADO; LUIS RIVERA FLECHA; ALEJANDRO TZUM VICENTE; IVONNE GONZALEZ; MIGUEL MARTIN LEON; OLGA MALPICA; FRANCISCA PEREZ; JOSE RICO; EVELYN TRINIDAD LIERAS; MARIZOL ZAYA JIMENEZ; JOSE J. CASTRO; DIANIRA COTTO DIAZ; ENIS DALISJO VALLES; MOISES FLORES CARBONELL; EMELDA GOMEZ; JOHNNY LUPO LEON; SERAFIN MORALES; FELIX QUINTANA MALDONADO; ESSAU RIVERA; ALEXIS ALAMEDA; ESPERANZA ALVAREZ; LORY ALVINO-LOPEZ; RAMON CRUZ SERGES; JOHNNY HUERTAS; EDGARDO JIMENEZ MOLINA; FERNANDO NATARENO; ALICIA ORTIZ SANCHEZ; JULIO REYES PEREZ; ALBERT TORRES MORALES; HECTOR S. VELASQUEZ; JENNIFER VALENTIN VELEZ; CARMEN ACEVEDO; CELINES LOPEZ CARMONA; ROBERTA MARTINEZ; ELIZABETH MEDELLIN; KEILA MONTANEZ SANTOS; YESENIA VEGA; GLADYS ARROYO; KARINA BELASKES PIRIS; JOSE O. GARCIA; SUZETTE GARCIA BARBOSA; SANTOS GRAMAJO MAZARIEGOS; MICHAEL GUERENA PAGAN; MANUEL J. HERNANDEZ; GLORIA KIDWELL; VERONICA S. LUGO; JORGE E. MEDINA GONZALEZ; PEDRO C. NIEVES; RODOLFO RAMIREZ LOPEZ; JUDY C. RAMOS; WILFREDO J.

RODRIGUEZ; JOSE LUIZ SANCHEZ; HARRY SANTIAGO; REBERT AMISIAL; ROSITA AMI SIAL; KENNETH A. ARMSTRONG; DAVID W. BADGER; DOROTHY M. BAILEY; FILOMENA BARTOLON; MARTHA BELL; MARIA BERDUO; GALEN BYERLY; DIEUNATHAN CUSTIN; HECTOR COLON CLASS; JAIRO CORADO; ALLISON M. DAVIS; LIONEL BUENO; MIMOSE DELIUS; MARILITZA FERRER-FIGUEROA; GERALDINE FOREMAN; CHARLES D. FREEMAN; VIRGINIA GAONA; BURNELL GIBBS; ELIZABETH GONZALEZ-COLON; ABILIO HERNANDEZ; ALEJANDRA HIDALGO; KATHY D. HOUCHENS; LOLA M. JACKSON; ARTHUR JOHNSON; MARVIN KEATON; MARIA A. LAGUNAS; SHEILA J. LOPEZ; TITO LOPEZ; WANDA IVETTE LUCIANO SOLIS; LEROY MANN, SR.; JEAN MARCELIN; MARCELINA L. MARIOT; LORRAINE MILES; SAMANTHA MIRELES; EDUARDO MORALES; NANCY ORTIZ NIEVES; LAINYA NOEL; HERIBERTO C. OLIVO; MARILYN ORTIZ RODRIGUEZ; SHARON N. ORTIZ; LARRY D. PARKER; YAHAIRA PAGAN; VAINQUEUR PAUL; METELLUS PIERRE-LOUIS; GLADYS E. RAMOS; LUZ N. RAMOS ORTIZ; IVONIA RAYMOND; ALEXANDER J. RICHARDSON; JEAN RICHE; LULA RIDDICK; WALTER RIVERA ROSA; CHRISTINE ROUNDTREE; RAFAEL R. SANTIAGO; PELIZIA SATIRIN; ELAINE SHEPPARD; SAIDA SOTO; ESTHER RE SUTTON; CHARLIE THOMAS, JONATHAN TORRES

FIGUEROA; MATTHEW D. TRAGO; SILVIA TRUITT; JACKIE D. TULL; MARIO VELASQUEZ; MARIO VELASQUEZ; ROBERTO VELASQUEZ FIGUEROA; LUCIEN VERNET; ELIZABETH VITELA; ALEX WASHINGTON; RUTH ANN WHITE; GARY D. WILLIAMS; LINDA WOODS; ELIOT YASE VELEZ; YAHAIRA NAVARRO GONZALES; LIDIA NUNEZ RODRIGUEZ; JUAN RODRIGUEZ; GLADYS M. STEPHENS; AIDA N. TEXEIRA MELENDEZ; FREDDIE A. TORRES CANDELARIO; JIMMIE TORRES RIVERA; JONATHAN D. TRAVIES; CEFERINO J. VASQUEZ; BRIAN WILLIAMS; AGAPITO ALVARADO; LAURA ASCENCIO; CLINTON A. BECKETT; EDWIN BORRERO; JOSE CABALLERO; CHRISTIAN CAJIGAS; ANDREA CARTER; GLORIA CASTANEDA; JACOB CEUS; EDUARDO COLON RIVERA; YAJAIRA CRUZ; LUCY CRUZ HIRALDO; THOMAS DANIELS; LIANETTE DE JESUS; JANNIE M. EVANS; CHARITABLE EXANTUS; WANDA FERNANDEZ; FRANCISCO R. FERRER; LEFILS FLORES; MARCELLUS M. FOOKS; ELI S. GARCIA; MANUEL GAUCIN; ROBERT GEDEON; ANNIE GEORGE; NORMA I. GIRALD; JAMES A. GREEN; ANNETTE GUSTIN; JACQUELINE GUSTIN; HAROLD A. HARRIS; JEAN A. LARKIN; KEITH P. LOFLAND; ESTEL MAXION; ARACELI MEDELLIN; DONNEIL MARK MURRAY; RAMON OLIVA; MARTA ORTIZ; FLORA ORTIZ MORALES; ANGEL LUIS PEREZ; ARCHIBALD PIERRE; ODETTE PIERRE; CHARLES L. PINDER;

JACQUELINE REGUSME; GLECERIA V. REYES; ROBERTO DENNIS RIVERA; RAUL M. RODRIGUEZ; WANDA RODRIGUEZ; JAHAIRA RODRIGUEZ CONDE; SAMUEL ROQUE-RAMOS; SAMUEL ROQUE-RAMOS; MARCOS A. SANTIAGO; BRENDA SHIELDS; WILLIAM HENRY TEAGLE; WILLMARI TORRES REYES; HAMARA VAZGUEZ; ELIMAS VELASQUEZ; JULIO M. VELASQUEZ; WILLIAM L. BAGWELL, JR.; SHARLENE DIAL; JEFFREY HANCOCK; LAVERNE HARRIS; HARRY A. ORTIZ; JOSE RAMIREZ; CRISTINA RODRIGUEZ; CARL STALLINGS,

Plaintiffs - Appellants

v.

ALLEN FAMILY FOODS INCORPORATED,

Defendant - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under

Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 6, 2002

FLSA2002-2

Dear *Name**,

This responds to your letter of December 12, 2001, on behalf of ***Name**** requesting reconsideration of two opinion letters issued by the Acting Administrator of the Wage and Hour Division and the Administrator of the Wage and Hour Division, respectively, on December 3, 1997, and January 15, 2001. The opinion letters concern application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), to employees in the meat packing industry. Specifically, the letters set forth the position that section 3(o) does not apply to the putting on, taking off, or washing of the protective safety equipment typically worn in the meat packing industry, such as mesh aprons, plastic belly guards, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, shin guards, and weight belts.

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Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

As noted in the January 15, 2001 opinion letter, the construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator. Further, a number of regional and district officials of the Wage and Hour Division and the Office of the Solicitor had, in their enforcement of some cases, historically applied section 3(o) if a bona fide collective bargaining agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

We have completed a careful review of the interpretation of section 3(o) set forth in these opinion letters, as well as in the opinion letter issued by the Acting Administrator on February 18, 1998. It is our view, based upon a reexamination of the statute and legislative history that the "changing clothes" referred to in section 3(o) applies to the putting on and taking off of the protective safety equipment typically worn in the meat packing industry, as described in your letter. It remains our view, however, that the term "washing" in section 3(o) applies only to washing of the person and does not apply to the cleaning or sanitizing of protective equipment. Accordingly, for the reasons set forth

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Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

below, we are withdrawing as of this date the opinion letters dated December 3, 1997, February 18, 1998, and January 15, 2001 (as it relates to section 3(o)).

Section 3(o) of the FLSA, enacted in 1949, provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms or by custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o). (We take no position in this letter on what constitutes a custom or practice for purposes of excluding time under section 3(o), or on whether there is such a custom or practice by any employers in your industry.) The FLSA does not define the term "changing clothes or washing" for purposes of section 3(o), and we do not believe that a plain meaning of the term is evident from the statute. One dictionary defines "clothes" as "garments for the body; articles of dress; wearing apparel" (The Random House College Dictionary (revised ed. 1982)), and another defines "clothes" as "articles, usually of cloth, designed to cover, *protect* or adorn the body..." (Webster's New World Dictionary (2d college ed. 1982)) (emphases added). *See also* 29 C.F.R. § 1910.1050 App. A (OSHA regulations

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characterizing "face shields" as a kind of "protective *clothing*") (emphasis added). The Department's interpretative regulations on "hours worked," published in 1965, merely repeat the terms "changing clothes" and "washing." *See* 29 C.F.R. § 785.26.

The legislative history is specific only with respect to the interpretation of "washing." The House version of section 3(o) would have allowed the elimination from hours worked of any activity of an employee as provided by the express terms of, or custom or practice under, a collective bargaining agreement. *See* S. Rep. No. 640 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2241, 2255. The conference committee explained that it narrowed the scope of the provision by "limit[ing] this exclusion to time spent by the employee in changing clothes and *cleaning his person* at the beginning or at the end of the workday." *Id.* (emphasis added). This explicitly narrow reading of "washing" is supported by a statement in the debates that describes the conference agreement as "limit[ing]" the provision's application "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday." 95 Cong. Rec. 14875 (1949). *See also* 29 C.F.R. § 790.7(g) & n. 49 (interpretative rule addressing the Portal-to-Portal

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Act's test for preliminary or postliminary activities using the phrases "changing clothes" and "washing up or showering"); Wage and Hour Division's Field Operations Handbook 31b01 (using the phrase "wash up time" in discussing section 3(o) and "hours worked").

The legislative history does not specifically address the scope of "changing clothes" under section 3(o). The provision was enacted subsequent to the Portal-to-Portal Act of 1947, which in turn was enacted in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Mt. Clemens*, the Supreme Court held that the time that employees spent walking to and from their work stations on the employer's premises was "hours worked." 328 U.S. at 691-92. The Court also found compensable, as a necessary prerequisite to the employees' production work, such preliminary activities as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger sheaths, preparing equipment, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools. *Id.* at 692-93.

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The legislative history indicates that some clothes changing was expected to remain compensable after enactment of the Portal Act, and the Supreme Court has so held. *See Steiner v. Mitchell*, 350 U.S. 247 (1956). During debate on the Act, one of the bill's sponsors stated that the clothes changing and showering that might be required of "chemical plant workers" would remain a compensable principal activity. 93 Cong. Rec. 2297-98 (1947). The Supreme Court appended this legislative history to its decision in *Steiner*, where it held that the time spent by workers in a battery plant changing into and out of old work clothes and showering was compensable. Although "changing clothes and showering under normal conditions ... ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time" under the Portal Act, the Court ruled, clothes changing and showering under the circumstances of this case are "an integral and indispensable part of the production of batteries." 350 U.S. at 249, 255-56. Thus, while the Portal Act excluded "ordinary" clothes changing from compensable time, other clothes changing that was not "merely a convenience to the employee" and that was "directly related to the specific work" remained compensable (93 Cong. Rec. 2297-98 (1947)).

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The function of section 3(o) is to allow companies and unions to agree to treat as non-compensable clothes-changing activities that otherwise would be compensable under the Portal Act. In stating that the Act invalidates such agreements in the case of protective gear in the meat packing industry, the 1997 opinion letter confined its reasoning to a single sentence where it explained that "clothes" has a "plain meaning" which excludes (i) "protective" articles that (ii) may be "cumbersome in nature" and (iii) are "worn over ... apparel." Upon review, we have concluded that none of these qualities should prohibit a company and union from regarding the gear worn in the meat packing industry as clothes for purposes of section 3(o).

The Department of Labor has described articles worn for protective purposes as clothing, and so has a leading dictionary. *See* 29 C.F.R. § 1910.1050 App. A (OSHA regulations characterizing "face shields" as a kind of "protective clothing"); Webster's New World Dictionary (2d college ed. 1982) ("clothes" are "articles, usually of cloth, designed to cover, protect or adorn the body ..."). The Supreme Court has used the phrase "protective clothing" on more than one occasion. *See, e.g., Industrial Union Department,*

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AFLCIO v. American Petroleum Institute, 448 U.S. 607, 660 61 (1980) (the "Benzene" case) (plurality) (stating that compliance with an OSHA requirement "could be achieved simply by the use of protective clothing, such as impermeable gloves"); *United States v. Stanley*, 483 U.S. 669, 671, 690 (1987) (referring to clothing to protect from chemical exposure and radiation). Congress, in enacting the Portal Act, and the Supreme Court, in interpreting it in *Steiner*, recognized that the purpose of clothing specially worn for the workplace might well be protection. Indeed, it was in part precisely because the clothing at issue served protective purposes that, in the legislative debates and *Steiner*, Congress and the Court indicated that donning and doffing the clothing at issue was "integral" to the job and, accordingly, compensable.

That an article may be "cumbersome" also is no indication that it is not clothing. Many items of clothing are cumbersome. In the case of clothing worn for protective purposes in particular, it often will be more protective if it is larger, heavier, and therefore more cumbersome than street clothes. It would disserve the workers the Fair Labor Standards Act is meant to protect if employers who wished to

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introduce bulkier and more protective gear in the workplace knew that in doing so they would lose their ability to bargain with their union over the compensability of donning and doffing protective gear. Such an intent should not be attributed to Congress in interpreting 3(o). In addition to lacking basis in the statutory text and legislative intent, a distinction between apparel that is "cumbersome" and that which is not is vague, difficult to administer, and fails to provide useful guidance to employers and unions regarding the legitimate parameters of their agreements and practices.

Finally, that an item is worn on top of another item plainly is no reason to believe they are not both items of clothing.

There are other bases in the history and purpose of section 3(o) for concluding that a broader interpretation of the provision is appropriate. It is reasonable to assume that when Congress enacted section 3(o), it had in mind the kind of "clothing" at issue in the *Mt. Clemens* case just three years earlier; that case involved aprons and overalls, shirts, and finger sheaths. Finally, a less rigid definition of "clothes" comports with Congress's intent in enacting

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section 3(o), which was to give a measure of deference on this aspect of wage-hour practice to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating the terms and conditions of employment. *See* 95 Cong. Rec. 11210 (1949).

In sum, for the foregoing reasons we believe that the term "clothes" in section 3(o) includes the protective safety equipment typically worn by meat packing employees. Accordingly, we interpret "clothes" under section 3(o) to include items worn on the body for covering, protection, or sanitation, but not to include tools or other implements such as knives, scabbards, or meat hooks. Furthermore, the term "washing" refers only to washing of the person, and not to the washing, cleaning, or sanitizing of protective or safety equipment. *See Saunders v. John Morrell & Co.*, 1 WH Cases 2d 879 (N.D. Iowa 1991).

Sincerely,

Tammy D. McCutchen
Administrator

Note: * The actual name(s) was removed to preserve privacy.